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No. 585.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

NATIONAL BROADCASTING COMPANY, INC. (KOA), *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF RESPONDENT IN OPPOSITION.

NATIONAL BROADCASTING COMPANY, INC.,
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CITATIONS.

Cases:

F. C. C. v. Pottsville Broadcasting Company, 309 U. S. 134 7

Statutes:

Section 240 (a) of the Judicial Code (28 U. S. C. A. 347(a)) 1

Communications Act of 1934, as amended:

Section 405 3
Section 409(a) 2, 3

Miscellaneous:

Rules and Regulations of the Federal Communications Commission:

Section 3.22 3
Section 3.25 3

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OPINION.

The opinion of the United States Court of Appeals for the District of Columbia, not yet officially reported, appears in the record at pages 183-213.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code. (28 U. S. C. A. 347(a))

SUPPLEMENTAL STATEMENT OF FACTS.

Petitioner has made much of the fact that Mr. Justice Rutledge, in his opinion below, has suggested that respondent's right to participate in the proceedings did not arise until after December 16, 1940. This makes necessary the submission of a brief supplemental factual statement demonstrating the significance of that date.

When the Commission is unable to conclude from an examination of an application that it should be granted in the public interest, it has been its practice for many years to designate the application for hearing and to issue a "Notice of Hearing" setting forth the issues to be met by the applicant. In this proceeding, the first Notice of Hearing was dated September 2, 1939 (R. 11). It stated, *inter alia*, that the purpose of the hearing would be:

> "3. To determine whether public interest, convenience or necessity would be served by modifying the Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III), to authorize the operation of WHDH as proposed."

Being then on notice that the Commission contemplated a change in those regulations which precluded a grant of the WHDH application, respondent filed a petition to intervene on September 23, 1939, which was denied on September 29, 1939 (R. 13). The character of the proceedings then within the contemplation of the Commission and of the parties is further evidenced by the Commission's action on November 20, 1939 when it designated Commissioner Case to preside at the hearing (R. 25). Under Section 409 (a) of the Statute, the Commission may not assign to an Examiner any hearing which involves a change of policy or a new kind of use of frequencies.

But no hearing was held under this first Notice. Instead, on December 2, 1939, the Commission, on its own motion, rescinded the Notice of September 2 and issued a second

Notice which indicated that the purpose of the hearing would be:

> "1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied, preclude the granting of the application;"

The hearing held on January 29 and 30, 1940, was held under this second Notice before Examiner Hyde of the Commission (R. 27). Since it involved merely the *construction* of Commission Rules as distinguished from a *proposal to modify* them, it was an appropriate subject for hearing before an Examiner under Section 409(a).

On December 9, 1940, the Commission released its "Proposed Findings of Fact and Conclusions" based upon the hearing which had been held on January 29 and 30, 1940 (R. 27-46). Five members of the Commission participated of whom two dissented. All five agreed that Sections 3.22 and 3.25 of the Commission's Rules did preclude the granting of the WHDH application (R. 30, 35, 45). Up to this point, the second Notice was controlling, the hearing before an Examiner had been proper and had the decision been based upon this interpretation the case would have been closed.

But at this point, three members of the Commission determined that the Rules should be modified to permit the granting of the WHDH application and having done so, voted to grant the application (R. 27-32). Respondent then filed its second petition to intervene on December 16, 1940 (R. 46-49) which was denied on January 7, 1941 (R. 50). On April 7, 1941, the Commission adopted its final order amending Section 3.25 of its rules and granting the WHDH application (R. 50). Commissioners Case and Craven dissented. Respondent's petition for rehearing, filed under Section 405 of the Act (R. 52), was denied on May 20, 1941 (R. 63) and the appeal to the Court of Appeals for the District of Columbia followed on June 7, 1941 (R. 1).

ARGUMENT.

In its reasons for the allowance of the writ petitioner relies almost entirely upon some differences of views expressed by the several members of the Court below. It points out that "On September 12, 1942, the Court handed down five opinions * * *"[1] and complains of the "uncertainty resulting from the diverse views in the opinion below".[2] Asserting its inability to comprehend the effect of the decision, the Commission states:

> "Not only is it difficult to determine what is required of the Commission on the remand * * *, but the Commission cannot with assurance follow an intervention procedure which will command the approval of a majority of the members of the Court below."[3]

At the outset it should be observed that two of the "Five opinions" creating petitioner's "uncertainty", are dissents and thus in no way add to the Commission's alleged perplexity in dealing with the instant case or in administering its intervention procedure generally in the future.

Of the remaining three opinions, Mr. Justice Rutledge, speaking for the court, held:

> "For the error in excluding appellant from participation as a party in the final and controversial stage of the procedure, contrary to the requirement of Section 303(f) of the Act, the order must be reversed, with directions to afford appellant opportunity for hearing in accordance with the provisions of that Section."

Chief Justice Groner and Mr. Justice Vinson, in a joint concurring opinion, stated:

> "We are in agreement with Judge Rutledge that under Section 303(f) the Commission should have afforded appellant the right to participate in the hear-

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[1] Petition herein, Page 10.

[2] Petition herein, Page 8.

[3] Petition herein, Page 10.

ing as a party. But we are also of the opinion that, * * * Section 312(b) of the Act also provides a right of participation by appellant in the proceedings under that application. *While the question is no longer material here—since we assume that, in the present state of the record, the Commission will reopen the proceedings and permit the intervention of appellant as a party* —we express our disagreement with the view of Judge Rutledge that the Commission, in its discretion may exclude appellant from participation until after the proposed findings of fact have been made. * * *" (Italics supplied)

Mr. Justice Stephens concurred in Judge Rutledge's conclusion that appellant had a right of appeal as well as to intervention and also noted agreement "with the views and conclusions expressed by Justices Groner and Vinson in their separate opinion". Further, Mr. Justice Stephens pointed out that the right to be heard under the circumstances in the instant case could not be denied in view of the Fifth Amendment to the Constitution.

The circumstance of these separate opinions is advanced by petitioner as the underlying reason for the issuance of the writ. Respondent submits that for two reasons the asserted basis for invoking the Court's jurisdiction is insubstantial and does not warrant the exercise of this Court's discretion in petitioner's favor.

In the first place, there can be no real dispute that the Court has advised the Commission of its duties in the case before it. Certainly it should not be urged that the Court is under a duty over and above this to outline rules of conduct generally for the Commission's guidance in matters not pertinent or necessary to a decision on the case before it.

Mr. Justice Rutledge made this clear when he said:

"Without attempting therefore to blueprint the procedure to be followed with respect to the extent of appellant's (respondent's) participation in another hearing, we may leave such matters to the Commission's

> judgment, where they properly belong, subject only to compliance with the basic requirements of fair play and adequate opportunity to be heard."

And Mr. Chief Justice Groner and Mr. Justice Vinson, in their concurring opinion, added[4] "* * * in the present state of the record, the Commission will reopen the proceedings and permit the intervention of appellant as a party * * *." This clearly and unmistakably outlines the duty of the Commission under this decision. If members of the Court constituting a majority differed among themselves on matters related to, but not a part of, the final disposition of the case, such differences have no effect upon petitioner in carrying out the order of the Court to reopen the proceeding below and afford the respondent an opportunity to be heard. This result is unaffected by whatever divergence of views may have been expressed as to the reasons for this result, nor can the Commission complain of its inability intelligently to proceed in the case before it merely because of differences as to what respondent's rights would have been if the circumstances were different from those actually before the Court.

Secondly, it should be observed that this is not a case where *certiorari* is sought in order to clarify the law presently in a confused state because of a divergence of views among several different Circuit Courts of Appeal. The situation here is entirely different. If the petitioner were correct in its assumption that the conflict between the views of the four members of the Court constituting a majority made it difficult for it "to determine what is required of the Commission on the remand in the present case", it could and should have adopted the traditional and logical method of returning to the Court below for clarification and guidance. As this Court has said:

> "To be sure the Court that issues a mandate is normally the best judge of its content on the general

[4] Joined in by Mr. Justice Stephens.

theory that the author of a document is ordinarily the authoritative interpreter of its purpose.'"[5]

CONCLUSION.

It is respectfully submitted that the petition sets forth no substantial ground for the issuance of the writ of *certiorari*.

Respectfully submitted,

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January 9, 1943.

[5] *F. C. C.* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 141.

PROOF OF SERVICE.

Service of a copy of the foregoing Brief of Respondent in Opposition and receipt of a true and correct copy hereby is acknowledged this 9th day of January, 1943.

SOLICITOR GENERAL

By .....

FEDERAL COMMUNICATIONS COMMISSION

By .....